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The President's Page

By AUGUSTUS F. MACK, JR.
President, Los Angeles Bar Association

President Gus Mack

Many lawyers are so intent upon their side of the case that they completely overlook a basic concept in the practice of law. It is found in the simple utterance *"There are two sides to every story."*

Illustrative is the anecdote about the elderly gentleman who was obviously on his first train ride. When the conductor came for his ticket, the passenger inquired "How far is it from Rochester to Buffalo?" and was informed "86 miles." The passenger then asked "How far it is from *Buffalo* to *Rochester?*" Said the conductor "Why, the same distance, of course. What's wrong with you, anyway?" Then came the "other side of the story" as the elderly gentleman observed "Well, sir, I just wanted to be sure. It's only a week from Christmas to New Year's but a great deal longer from New Year's to Christmas."

The old gentleman had a point. There is always the other side of the shiny coin, the back of the beautiful picture, the unseen facet of the glittering diamond. All have their place in the scheme of things.

It goes without saying that we all want to be good lawyers. I conceive that a number of elements like integrity, learning, ability

and others go into the making of a fine, well-rounded attorney. Included near the top, however, is the recognition of both strong and weak points in the other fellow's case, the awareness of "two sides to the story."

Having this in mind, we can go a step further. Proper and timely appreciation of the opponent's strong and weak links should enable fair-minded lawyers to sit down and settle the case before trial or at least eliminate certain phases. There are those practitioners who think it is "cute" to surprise the other side, to "blow'em right out of the courtroom" at the trial. Did they ever stop to think that while such tactics may make good copy or increase one's reputation as a crafty trial expert, they in turn cost clients more money, more wear and tear, and more time away from their work? The practice of law is not a catch-as-catch can proposition but an orderly pursuit of the truth and application of the correct rule, all toward the end of achieving justice, achieving what is fair and right for all concerned.

If the foregoing seems platitudinous, my answer is to try it a while. You will like the way the formula works. At Christmas it seems particularly apt to project that reasonable appreciation of the "other side of the story" and a scattering of old fashioned courtesy go a long way toward making this law business efficient, pleasant and a real service to our clients.

The Bankruptcy Court—An Approach For the General Practitioner

By JOSEPH J. RIFKIND*

GENERAL PRACTITIONERS CAN NO LONGER AVOID BANKRUPTCY PRACTICE

Joseph J. Rifkind

The complexities of our modern economic system require the lawyer engaged in general practice more and more frequently to appear before the Bankruptcy Court. Bankruptcy filings in the Southern District of California for the fiscal year ending June 30, 1946, numbered 1028; by comparison, for the fiscal year ending June 30, 1957, there were 8285 filings! This increase of more than seven hundred per cent in the past decade is due not only to our changing economic system, but to the enormous growth of population in Southern California, with its accompanying business and industrial development. This development has made the Bankruptcy Court in the Southern District of California the largest in the country. All indications point to the continuation of this rapid growth, both in population and bankruptcy filings.

Due to this tremendous population increase and economic change, the general practitioner will be confronted more frequently than ever before with bankruptcy and related problems. Every lawyer will thus have occasion, from time to time, to appear before the Bankruptcy Court, whether it be in connection with the filing of proofs of claim, applications for leave to foreclose, petitions for reclamation (replevin), responses to orders to show cause, filing of voluntary or involuntary petitions in bankruptcy or some other more complicated matter.

The client's financial condition or the size of the matter may not justify consulting with or permit the expense of associating a bank-

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ruptcy specialist. Many general practitioners in the past have, however, been hesitant to undertake matters in the bankruptcy field for fear of its complexities. The writer believes that this is a mistake and that the general practitioner thereby cuts himself off from what should be an important and profitable source of business as well as an important service to his client.

Although the Bankruptcy Court is part of the United States District Court, it has many specialized problems, requiring the adoption of special rules. The United States District Court for the Southern District of California sometime ago appointed a Bankruptcy Rules Revision Committee of which the writer was Chairman. The Committee presented a completely revised and modernized set of bankruptcy rules for this district.* One of the primary objectives of the committee was to clarify and simplify the local bankruptcy rules for the general practitioner. These revised rules were adopted by the court and became effective on March 1, 1957.

Despite the fact that the new bankruptcy rules have been in effect for more than six months, most general practitioners still come into court completely oblivious of their existence. It is earnestly hoped that the publication of this article in the LOS ANGELES BAR BULLETIN will bring the existence of these rules to the attention of the rank and file of the bar in the Los Angeles area.

It is my sincere belief that these new bankruptcy rules are the most progressive and simplified in the entire country. I feel that any attorney, whether or not skilled in the bankruptcy field, by familiarizing himself with and following these rules, can more efficiently handle matters before the bankruptcy court. It is hoped that the following summary of the new bankruptcy rules will prove helpful both to the inexperienced and experienced practitioner alike. The local rules of practice are not in many instances ascertainable from the Bankruptcy Act, the text books or the reported cases. The bankruptcy rules are part of the rules of the United States District Court and can be found in any publication of the rules of that court. Needless to say, the following summary should be read in conjunction with a copy of the complete rules of the court and the Bankruptcy Act.

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*The bankruptcy rules are part of the rules of the U. S. District Court and can be found in any publication of rules of that court.

SUMMARY OF THE NEW BANKRUPTCY RULES

RULE 200. Provides that the local rules of the District Court shall be followed as nearly as may be practical in all proceedings initiated under the Bankruptcy Act. Empowers the judge or the referee to shorten the limitations of time prescribed to expedite hearings or otherwise modify such rules for the preparation or hearing of any particular proceeding.

RULE 201(a). Requires that the petition initiating the bankruptcy proceeding shall be filed in triplicate and shall set forth the address of the bankrupt or debtor, the full first and last name and the middle initial or name and all assumed, trade and other names or designations by or under which the bankrupt or debtor has been known or has conducted any business, occupation, profession or trade within six years prior to the filing of the petition.

RULE 202(a). Provides that all petitions in bankruptcy (including reopened proceedings), proceedings for arrangement and wage earners' plans, shall as of course and forthwith upon filing be referred by the clerk to a Referee in Bankruptcy. (The Chief Judge or Acting Chief Judge will continue to enter the order of adjudication as in the past.) This will enable the referees, immediately upon the filing of a proceeding, to issue orders to show cause, injunctions, appoint receivers and perform all other duties of their office.

RULE 203. Provides that respondents in Summary Proceedings desiring to contest the proceedings shall serve and file their answers, objections or other responsive pleading not less than two (2) days before hearing and authorizes entry of default upon failure to do so. The issues of law and fact are thereby defined, thus eliminating surprise and expediting the hearings. Provides for manner of enforcing orders made in Summary Proceedings.

RULE 204. Clarifies the procedure relating to Petitions for Review from order of Referee in Bankruptcy. It also revises the form of notice of filing the Certificate on Review to be given by the Referee to counsel and changes the time for filing Points and Authorities in the District Court in relation to the hearing of the review. Provides for the return of the files by the clerk to the Referee after the conclusion of the review. Provides for setting Petition for Review for hearing by clerk when parties fail to do so within the prescribed period. Provides for filing of request for notice of entry

of order so that time for filing Petitions for Review will not be overlooked.

RULE 205. Relates to method of certifying a person for contempt of court committed before Referee in Bankruptcy. It is an enabling rule to carry Section 41 of the Bankruptcy Act into effect.

CLAIM SHOULD STATE DETAILS

RULE 206. Provides that every claim when filed should set forth sufficient details to show that the amount is justly owing from the bankrupt and provides that failure so to do shall be cause for disallowance of claim. Restricts right to vote claims to claimant or his duly appointed attorney in fact. Enumerates the data to be set forth in Priority Labor Claim filed pursuant to Section 64a of Bankruptcy, in order to make out a prima facie showing of priority. This rule should greatly reduce the numerous objections filed and time consumed in hearing objections to claims and the expense thereof.

RULE 207. Provides for Interim Statement and contents thereof to be submitted by trustee to the Referee when presenting checks for countersignature. Provides that statement accompanying checks

shall be filed and made part of record of case thus enabling persons interested in the administration of bankrupt estate at all times to know the receipts, disbursements and balance on hand. Report and Account very often may not be filed for a year or even later after proceedings are commenced. This rule should give the Referees greater control and supervision of the administration and also be of benefit to the trustee and creditors.

RULE 211. Requires the application for dismissal to set forth under oath the reasons for the application for dismissal and whether any actual or tacit arrangement exists with any creditor or other person in connection therewith. The purpose of the rule is to prevent collusion among the bankrupt and creditors (Section 152, Title 18, Chapter 9, United States Code).

RULE 212. Will make uniform the dates for filing of the quarterly reports by depositories (banks) with clerk and the quarterly reports of trustees with Referee. This uniformity will enable the Referees better means of verifying reports of funds on deposit, filed by trustees, receivers and debtors in possession.

RULE 213. Eliminates the requirement for approval by an attorney of the innumerable nominal bonds filed by trustees and receivers. Provides that personal sureties on bonds in excess of $200.00 shall not be accepted unless accompanied by financial statement of the surety satisfactory to the Court. At present personal bonds are only accepted up to $100.00 resulting in needless payment of premiums on bonds up to $200.00 in small estates.

RULE 214. Sets forth the requirement for the discharge of the trustee in asset cases after the report and account has been approved and the funds disbursed. Also provides for the deposit with Clerk of the funds representing checks which have not been cashed within sixty days.

RULE 215. Provides for the books and records to be taken into possession by the trustee and for return of books and records to the bankrupt after the administration of the estate is closed and for destruction thereof if not reclaimed by bankrupt within 60 days written notice.

PAYMENT OF COMPENSATION TO DEBTOR IN POSSESSION IS PROHIBITED

RULE 218(a). This rule provides that the debtor in Proceedings for Arrangement shall be continued in possession only in ex-

ceptional cases where compelling considerations so require. Provides further that when debtor is permitted to remain in possession, he may be required to furnish adequate bond for the protection of the estate and for indemnity against loss thereto or diminution thereof.

(b) The rule further prohibts payment of compensation to the debtor in possession or partner or officer or stockholder or director of debtor in possession unless such employment and compensation is first authorized by the court.

(c) The rule further makes it necessary to file objections to Plan of Arrangement at least five days before hearing of Application to Confirm Plan. This subdivision is to prevent surprise objections and the delays resulting therefrom.

This Rule 218 and Rule 219 are intended to give the court greater supervision of debtors in possession and to prevent diminution of the debtors estate while the business is being operated, pending the hearing and determination of the plan of arrangement.

RULE 219. Requires weekly reports to be filed by debtors in possession, receivers and trustees in operating cases and sets forth data to be contained in such reports. Also provides that receiver, trustee and debtors in possession in operating cases shall open a special tax account for deposit of all taxes of every kind accruing during and payable as the result of such operation.

RULE 220. Requires the U. S. Marshal to return all process with proof of service directly to Referee in Bankruptcy instead of

Clerk of Court, to facilitate administration. This practice should particularly expedite making adjudications in involuntary cases in which the alleged bankrupt has defaulted.

RULE 221. Authorizes referees by majority action to adopt administrative regulations not inconsistent with provisions of the Bankruptcy Act, the General Orders, the Rules of the District Court or the Bankruptcy Rules. This rule is intended to promote uniformity of administration before all referees.

PETITION MUST STATE FACTS SUFFICIENT TO ENTITLE PETITION TO RELIEF SOUGHT

The able and conscientious lawyer will not, of course, go into the state courts without examining the codes applicable to his subject and familiarizing himself with the rules of the court. Correspondingly, the able and conscientious lawyer undertaking a bankruptcy matter should examine the Bankruptcy Act and the rules of the District Court applicable to his subject. Just as a complaint must state facts sufficient to constitute a cause of action so any petition for relief filed in the bankruptcy court must state facts sufficient to entitle the petitioner to the relief sought. Pleadings are very much the same as in any other court, the general rules of evidence govern and the Federal Rules of Civil Procedure are expressly made applicable to bankruptcy proceedings.

Section 30 of the Bankruptcy Act authorizes the United States Supreme Court to prescribe all necessary rules, forms and orders as to procedure and for carrying the provisions of the Act into force and effect. These rules are referred to as General Orders and the forms as Official Forms. These General Orders and Official Forms adopted by the United States Supreme Court are usually in the back of all publications of the Bankruptcy Act and can, of course, be found in the United States Code Annotated. The lawyer who wishes to pursue his research further should refer to Collier on Bankruptcy or Remington on Bankruptcy, both of which are the recognized authorities on the subject of bankruptcy.

CONCLUSION

It has been my experience, after listening to hundreds of cases during the past few years, that many general practitioners, with a reasonable amount of preparation, can and do as good and very often a better job of handling an ordinary bankruptcy matter than many so called bankruptcy experts.

Representing the Buyer in Escrow

By ARTHUR G. BOWMAN*

Arthur G. Bowman

There has been an increasing tendency for parties to an escrow, particularly the buyer, to avail themselves of the services of an attorney. This is apparent from numerous inquiries received of late from attorneys regarding ways and means of aiding the client in an escrow transaction. There are many problems which may arise wherein the services of an attorney can prove very beneficial.

Assuming the attorney is consulted before escrow instructions are signed, what are some of the matters that require special consideration? The following situations are a few of the problems that have been encountered.

COVENANTS, CONDITIONS, RESTRICTIONS, RIGHTS, RIGHTS OF WAY AND EASEMENTS OF RECORD

Unless the buyer is familiar with matters of record affecting the title to the property being purchased, an appropriate qualification of the escrow instructions may be desirable. Typical is the following provision in many forms of escrow instructions: Title is to be vested in buyer, free of encumbrances except "conditions, restrictions, reservations, covenants, rights, rights of way and easements now of record, if any." If the buyer is not familiar with such matters of record, he should qualify in an appropriate manner the above quoted provision. It has been recommended in some cases that the following words be added to the printed form: "all subject, however, to buyer's approval." Or a provision may be inserted similar to the following: "Buyer reserves the right to approve of all matters shown on the preliminary report of title, a copy of which is to be furnished to the buyer." However, this gives rise to a question as to whether or not you have an enforceable contract by reason of uncertainty or because the contract is not complete. See the case of Bruggeman v. Sokol, 122 C.A. (2d) 876, 265 Pac. (2d) 575; also, Ferrera v. Silver, 138 C.A. (2d) 616, 292 Pac. (2d) 251.

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A suggestion which should eliminate any question of uncertainty is to delete from the printed form of escrow instructions the language first hereinabove quoted and to insert in lieu thereof those items only which the buyer is familiar with and approves. A seller usually will know before going into escrow what easements, restrictions and other matters of record affect the title to his land, and if these matters are disclosed at the outset there will be less danger of the deal collapsing because of the buyer's dissatisfaction with the conditions of title.

The fact that land is subject to covenants, conditions, restrictions and easements doesn't necessarily mean that a buyer will not go through with a deal; these matters are usually a benefit as well as a burden, and it is only when a buyer's purpose will be defeated that any serious objection to showing such items will be made, assuming the buyer does in fact want to acquire the land which he has already shown an interest in.

The Mary Pickford case reported in the Los Angeles Times on April 20, 1957 is illustrative of the importance to the buyer of ascertaining all the terms, conditions and provisions of recorded instruments affecting the land. That case involved a complaint by the buyers that they were not informed of a restriction providing that in 1973 the property, consisting of a beach roadside restaurant, could no longer be used for anything but residential purposes. The court held that there was no evidence that the sellers had actual knowledge of the matters complained of, and that it was up to the buyers to make a thorough investigation before buying.

Insofar as easements of record are concerned, it is particularly important to ascertain the exact purpose and the exact location. Unlocated easements, often referred to as "floating" easements, require special consideration.

TAKING SUBJECT TO OR ASSUMING DEEDS OF TRUST OF RECORD

As in the case of any other matter of record, it is important that the buyer ascertain all of the terms, conditions and provisions of a deed of trust that he has agreed to take subject to, and not merely ascertain the unpaid balance owing on the note secured by the deed of trust. A copy of the deed of trust should be obtained; being familiar with the provisions of the printed form of deed of trust is not enough, as the printed provisions may have been modified

by a special provision. In one case a buyer belatedly discovered to his sorrow that there was a provision which gave the beneficiary the option of increasing the interest rate from 5 to 7 per cent. An automatic acceleration of due date provision is another item that often presents difficulties.

DEED OF TRUST IN FAVOR OF SELLER

A prepayment privilege is of importance to the buyer if he contemplates paying off the note as soon as possible. Whether the note provides for inclusion of interest in the installment payments or whether interest is extra is also of importance. And a provision which can be of material consequence is the automatic subordination clause. These clauses must be carefully drawn to carry out the intent of the parties, particularly the buyer of unimproved property, and must sufficiently describe the later trust deeds to which the instrument will be subordinated. The later trust deeds should be referred to by amount, interest rate, period of lien, etc. If uncertain as to these details, then the question of unenforceability arises. The case of Gould v. Callan, 127 Cal. App. (2d) 1, 273 Pac. (2d) 93, is illustrative of this rule.

In that case it was held that a realty sale contract containing a provision for subordination of a second trust deed to the lien of a later trust deed to be executed in the event the buyer should decide to construct a building on the property was too uncertain and indefinite to be specifically enforced by the buyer where such provision failed to state the amount of interest which the obligation secured by the later trust deed was to bear, nor was there any provision made as to the terms and conditions of payment of the obligation to be secured by such later trust deed. The court pointed out that Section 3390, subdivision 6, of the Civil Code includes among the obligations which cannot be specifically enforced, "An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," and cited numerous cases in which the courts denied specific enforcement of contracts which were incomplete, indefinite or uncertain, with respect to the terms of payment of deferred balances or the terms of the incumbrances representing such deferred balances. The court stated: "If something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party, by the very terms

of the promise, may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise."

SMOG CONTROL REQUIREMENTS

As pointed out in an article in the January, 1957 issue of the LOS ANGELES BAR BULLETIN entitled "Caveat Emptor and Lawyer, Too," by William A. Sherwin, transactions involving apartment houses and business establishments should take into consideration the relevant provisions of the Health and Safety Code and the Rules and Regulations of the Air Pollution Control District.

TAXES AND ASSESSMENTS

The exact amount of taxes that are a lien on the real property should be ascertained before close of escrow. The fact that personal property taxes may be included as a lien on designated real property is sometimes learned by a buyer the hard way. In a recent case where the escrow closed on the assumption that the current tax bill would be the same as the previous year's taxes, the buyer discovered too late that he was obligated to pay the personal property taxes on the seller's boat that had been made a lien on the real property. This cost the buyer approximately $650.00 more than anticipated.

This situation has been remedied to a certain extent by an amendment to Section 2189 of the Revenue and Taxation Code, effective September 11, 1957, which now provides that a tax on personal property is a lien on any real property on the secured roll also belonging to the owner of the personal property, *if the personal property is located upon such real property on the lien date,* and if the fact of the lien is shown on the secured roll opposite the description of the real property.

Proposed assessments which have not become a lien should also be taken into consideration. The Appellate Department of the local Superior Court ruled in the case of Lobe vs. Barron, reported in the L. A. Daily Journal Reports, Vol. 4, No. 8 (August, 1953), that where there is no matured, completed assessment evident in the sale of land, a pending assessment is not an incumbrance which the vendor must pay. In that case plaintiff bought a parcel of land in the city of Los Angeles from defendant, and after the transaction was closed, plaintiff was confronted with an assessment against

the land under the Street Improvement Act of 1911. Plaintiff contended that the seller should pay the assessment and, upon seller's refusal, brought this action. The contract between the parties contained a provision that the property was "to be free and clear of all incumbrances." The assessment was not a lien when the transaction closed, but plaintiff nonetheless asserted that it was an "incumbrance" within the meaning of the contract. However, the court held that under the facts the assessment was not an "incumbrance" on the date of the conveyance, and the buyer was obligated to pay. The case of Wright v. Lowe, 140 Cal. App. (2d) 891, 296 Pac. (2d) 34, is also illustrative of the uncertainty that can arise in connection with assessments.

In that case recission of a contract of sale of real property was granted in an action by the seller, based on mutual mistake, where the contract was found to be an ambiguous instrument, containing a provision that the buyer agreed to "assume" the assessments, and that the property as delivered is to be "free of assessments." Street and sewer assessments had been levied against the property, and at the time of the sale in question, these amounted to almost $8,000.00. The assessments were, as the court pointed out, a lien on the property, but were payable over a term of many years, an installment being collected annually with the taxes. The buyer testified that it was intended that the amount of the assessments should be deducted from the purchase price, which would have meant that the seller's realization from the sale, instead of being in the neighborhood of $8,000.00, would have been an algebraic quantity of minus about $130.00. The seller, on the other hand, as she testified and as the court believed, did not know of the assessments and had no idea that the large amount of these would be deducted from the purchase price. The court stated that "The written contract, in fact, not only admits of two interpretations, one favorable to the seller and one to the buyer, but it may well be that if the contract alone were before us on a question of construction rather than of rescission, the preferred interpretation would be against the buyer, especially because he dictated the terms." To avoid an obvious injustice, rescission and cancellation properly were decreed.

SUBSTANDARD OR UNSAFE STRUCTURES

The effect of Section 17829, Health & Safety Code, also Ordinance No. 100677 of the city of Los Angeles (Mun. Code Sec.

96.121(h)), should be considered. A lien which may be created in connection with the cost of removal of a substandard or unsafe structure is on a parity with the lien of state, county and municipal taxes. At the time this article was written, the Los Angeles newspapers carried a report of a proposed ordinance to protect buyers of rooming houses or converted apartment houses from unwittingly purchasing property slated for demolition or needing extensive repairs. One article cited the case of an elderly couple who invested their last $7500.00 in a rooming house hoping to gain an income for their old age and lost their investment because the structure did not conform to the City Building Code.

No ordinance appears to have been enacted so far with respect to protection for buyers of substandard structures, although the Municipal Code dealing with such structures has since been amended in several respects by Ordinance No. 110275 approved October 31, 1957.

POLICY OF TITLE INSURANCE

Sellers are usually obligated to furnish a standard coverage policy of title insurance, but there are instances where a buyer's requirements should include an extended coverage policy. This includes insurance of off-record matters which are ascertainable from an inspection of the property and from a correct survey. It is essential that any one purchasing real property inspect the property, as rights which are apparent on the ground and rights which can be ascertained by making inquiry of persons in possession are as important as matters appearing of record. Easements apparent on the ground, possible mechanic's liens, hidden defects in boundaries, encroachments, and rights of persons in possession are of concern to a buyer. Rights of persons in possession are, from the fact of possession alone, just as effective against persons dealing with the land as are rights evidenced by the public records. Such possessory rights might exist under an unrecorded lease, an option to purchase, a contract of sale, or might depend entirely upon adverse possession. If the buyer requires insurance against such matters, then an extended coverage policy or an appropriate indorsement on the standard coverage policy should be called for by the escrow instructions.

If the buyer is obtaining an easement appurtenant to the land being acquired, the easement should be included in the description of the land for title insurance purposes.

OWNERSHIP OF MINERALS

If any portion of the mineral rights are excepted from the property, this may give rise to a problem as to surface right of entry. Either the requirement of a quitclaim deed of the surface right of entry or a drill site agreement should be covered in the escrow instructions.

ZONING ORDINANCES

Acts or regulations of any governmental agency (i.e., zoning ordinances) regulating the occupancy, use or enjoyment of the land or any improvements thereon, or prohibiting reductions in dimensions or area, or separation in ownership, or the effect of violations thereof, are excluded from the coverage of a policy of title insurance. The buyer should be cognizant of these matters before going into escrow, and protect his interest by suitable provisions in the escrow instructions covering intended use of the property.

TERMITE REPORTS

Termite reports can cause as much difficulty as anything else in escrows. Sometimes the use of terms can cause confusion, such as "termite clearance." Termite companies do not issue a clearance; it is the necessary practice to use words in their forms like "visible," "accessible," etc. Provision should be made for approval of the report by the buyer prior to the close of escrow. For a case involving the obligation of the seller to deposit a "terminte clearance" in escrow and do any necessary corrective work, see the recent case of Johnston v. Seargeants, 152 A.C.A. 216.

In that case the buyer brought an action for rescission of a contract for the purchase and sale of real property, asserting that the seller failed to perform according to their agreements and in particular to make the premises "clear of active, visible infestation by termites, fungi and dry rot." The contract of purchase and sale consisted of a deposit receipt dated October 8, 1954 and escrow instructions dated October 12, 1954, providing for a 90-day escrow. The escrow instructions contained the following provision: "Seller will deposit in this escrow for the buyer, a termite report of a recent date by a state licensed pest control operator showing the above described property to be free and clear of all visible evidence of termite, dry rot and fungi. Any corrective work to be done at

the seller's expense." The seller deposited in the escrow a termite clearance dated August 24, 1954, but evidence at the trial disclosed that the premises, in fact, were infested with termites, dry rot and fungi which were visible and subject to discovery on inspection. The trial court gave judgment in favor of the buyer for rescission, which judgment was affirmed on appeal.

With respect to the finding of the trial court that it was the duty of the seller under the contract to make the premises free and clear of visible evidence of termites, fungi and dry rot, and that the seller did not perform all of the covenants agreed by him to be performed, the seller contended on appeal that he was under no such duty; that his only duty in this respect was to deposit in the escrow for the buyer a termite report of a recent date by a state licensed pest control operator showing the property to be free and clear of visible evidence of termites, dry rot and fungi; that the escrow file contained such a termite report dated August 24, 1954, and that the only issue is whether a report 45 days beforehand is "of recent date." In rejecting this contention, the court stated as follows:

"The contract provided not only for the deposit by the seller in the escrow of a termite clearance of recent date, but also that 'Any corrective work to be done at the seller's expense.' The obvious purpose in including the foregoing provisions in the contract was so that plaitiff would have assurance that the property she was purchasing was, at that time, free and clear of all visible evidence of termites, dry rot and fungi. It may also be assumed that the seller would not expect to obtain such a termite clearance unless the property were in fact free from visible infestation, and unless and until the seller deposited the termite clearance in the escrow, plaintiff was under no obligation to accept title to the property. It follows, therefore, that if the premises were not free and clear of visible evidence of termites, the seller was under an obligation to pay for any corrective work to put them in such condition or the buyer was entitled to rescind the contract at the expiration of the 90-day escrow period."

PERSONAL PROPERTY

If the personal property is to be included in the transfer, it should be described with certainty to avoid later misunderstanding. Also, inquiry should be made as to rights of third parties—conditional vendor; chattel mortgagee, etc. If any water stock is involved, suitable arrangements should be made for its transfer.

METHOD OF TAKING TITLE

The vesting of title in the purchaser should be discussed with and explained to the purchaser. This is very important, both tax wise and otherwise, and is an area where the attorney's services can be most helpful. This is particularly true where a considerable number of purchasers are new to the state of California, and are unfamiliar with the distinctions between community property, joint tenancy and tenancy in common.

By way of illustration, it is sometimes desirable for capital gains tax purposes that a husband and wife hold title as community property rather than in joint tenancy. Where there is a material appreciation in the value of the property, a community property ownership will assure a new basis for the entire property upon the death of the husband, and the minimization of income taxes upon subsequent sale of the property. The distinction between joint tenancy and community property was especially significant in this respect prior to the adoption of the 1954 Internal Revenue Code. Under the former income tax law, the basis of joint tenancy property remained the same on the death of a joint tenant, even though some or all of the value of the property was included in a decedent's gross estate. As to decedents dying after December 31, 1953, under the new law a surviving joint tenant will obtain a new basis for the entire property if the decedent furnished all of the consideration. However, where the decedent furnished only a portion of the consideration, only that portion of the property will be included in his gross estate. The surviving joint tenant will acquire a new basis as to such portion, but will retain the old basis for the remaining portion.

For Those Who Have Served:

RECOGNITION

For Those Who Have Not:

A CALL TO DUTY

Theodore Roosevelt said: *"Every man owes some of his time to the upbuilding of the profession to which he belongs."*

Many attorneys have been doing just that this year in their unstinting efforts on behalf of indigent defendants in the Federal Court. Our Federal Court needs a public defender system similar to our excellent county and city public defender offices. But until such time as Congress solves this problem, attorneys will continue to have a duty to insure a defendant's constitutional right to representation.

The following list contains the names of the men who have served in recent months on behalf of indigent defendants. The individual contribution in number of hours is considerable and collectively represents thousands of valuable hours. They should be commended. In some cases the attorney was an employee of a title company or other corporation and their employers are also to be commended for permitting the service.

The "senior" men in Los Angeles, for the most part singularly absent from this list, should scan it to see whether younger men from their offices have served. If they have served, it should be an answer for why some of the other work in the office went undone for a time. If such names are not there, they should help the organized bar in the performance of this public duty by making the climate in their office more favorable to service on the Federal Courts Criminal Indigent Defense Committee by the younger men in their office.

Arthur Alef
Clifford R. Anderson
Leon S. Angvire
Joseph Argenta
Brewster Arms
Richard J. Barich
Robert S. Barnet
Philip Barnett
Irvin S. Bartfield
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Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

When I arrived in San Francisco a reasonable number of years ago, with the ink scarcely dry on the law school diploma I clutched in my chubby little hand, one of the first fields of legal activity to which I was apprenticed was that of stock transfers. I learned the trade from both sides, working for a transfer agent and from time to time for people who were trying to get their stock transferred of record by other transfer agents. Some of the complications encountered were well nigh incredible.

I recall that one proposed stock transfer involved, among other things, sending an assortment of papers on a number of round trips to the Azores. The language barrier didn't help any. Nor did the fact that the documents had to be acknowledged before a notary public by certain fishermen domiciled on one of the lesser islands which did not have such a functionary in residence. Nor was it speeded up by the circumstance that the fishermen were usually out fishing and seldom in residence themselves; nor by the further circumstance that there was no regular transportation from their island to the nearest notary. If my memory serves me correctly, after the acknowledgments were to come certain consular certificates to the identity of the notary and the regularity of his ministrations.

I don't know if that stock transfer was ever completed, for after it had been in the works for about a year I succumbed to the temptation to transfer myself to Southern California and eventually lost contact with it.

As a class, the most bothersome cases were those involving stock standing in the name of trustees. Almost invariably they involved a good deal of red tape, and sometimes it stretched from annoyance to agony and back.

Thus it was that I have read with a mixture of nostalgia and enthusiasm that a movement is well started which may make life happier for trustees, transfer agents and their lawyers. I quote

below (with certain footnotes eliminated or shortened) from an article in the *Illinois Bar Journal* on "Stock Transfers—Simplified" by Robert B. Wilcox of the Chicago Bar:

"The [last] . . . Illinois General Assembly enacted . . . a new statute[1] designed to repeal an onerous and useless American common law doctrine relating to transfers of corporate stock by fiduciaries. The statute will make unnecessary in many cases the production and submission to corporate transfer agents of copies of wills, court orders and trust instruments in support of the transfer of Illinois corporations' securities to and from the names of fiduciaries. . . . The Act, the work of a special committee of the Illinois State Bar Association, has also been enacted in Connecticut, . . . and . . . will be presented to a number of other legislatures, including New York's. . . .

"It has long been the rule in England that 'no notice of any trust, express, implied or constructive, shall be entered on the register or be receivable by the registrar . . .'[4] As a result, however, of an unfortunate decision in the case of *Lowry v. Commercial & Farmers' Bank*,[5] by Chief Justice of the United States Taney, sitting in 1848 as the circuit judge for the District of Maryland, American courts have 'developed the theory that a corporation, in making transfers of its stock on its books, acts in a fiduciary capacity and must protect the equitable, as well as legal, interests in its stock.'[6] During the course of his regrettable opinion Chief Justice Taney wrote that the corporation is 'the custodian of the shares of stock, and clothed with power sufficient to protect the rights of everyone interested, from unauthorized transfers; it is a trust placed in the hands of the corporation for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its negligence or misconduct.'[7]

"As has been well documented elsewhere, this doctrine is wrong in principle and has proved to be inappropriate and useless in practice.[8] No reasonable review of a stock transfer by a transfer

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[1]Ill. Rev. Stat., 1957, c. 32, secs. 439.50 to 439.57.
[4]Companies Act of 1929, sec. 101, first adopted by Companies Act of 1845, sec. 20.
[5]15 Fed. Cas. No. 8581 (C.C. Md., 1848).
[6]Christy and McLean, Jr., "The Transfer of Stock" (2nd ed. 1940) 2.
[7]Lowry v. Commercial & Farmers' Bank, supra, at 1047; Taney, 310. . . .
[8]Christy and McLean, Jr., op. cit., supra, note 4, at 2-7; Scott, "Participation in a Breach of Trust," 34 Harv. L. Rev. 454; and see the prophesy of Lord Coleridge to this effect in Re Perkins, 24 Q.B.D. 613.

agent can prevent the rare, wrongfully minded fiduciary from acting in breach of trust. The Taney doctrine simply impedes the efficient administration of modern trusts and decedents' estates. . . . The 'burden of excessive documentation' (required by stock transfer agents under present law) may even prevent fiduciaries from making necessary quick sales in falling stock markets. Thus Chief Justice Taney's rule in the *Lowry* case serves only to produce bewilderment and anger on the part of fiduciaries, heirs, legatees, trust beneficiaries and their respective counsel. 'The stockholder's complaint is generally justified but there is nothing the transfer agent can do about it.' "[10]

Of course this Illinois statute—which is called the "Fiduciary Security Transfer Simplification Act"—is not the first statutory attempt to repudiate the Taney doctrine, but it may be the first one to succeed. As Mr. Wilcox says:

"A wide variety of so-called stock transfer exoneration statutes have been adopted over the years in a number of states. These statutes have proved generally unsatisfactory and have not been relied upon by stock transfer agents because they are too narrow, too indefinite, or do not make clear the extent to which the corporation and its agent will be charged with a breach of trust as a result of actual or presumed knowledge by a corporate clerk or of a will or other public document of which corporations have been held to have 'constructive' knowledge."

* * *

"Lawyers do a lot of things for their clients which cumulatively produce a tolerable degree of cohesion in a society always capable of flying apart."—*Virginia Bar News.*

* * *

The Bar Association of the **District of Columbia** holds an Annual Spring Outing, the profits from which are devoted to the support of its Legal Assistance Office.

* * *

"Conflict of Laws seems to provoke more quarrels to the square inch than any other common law subject."—From the 1956 Annual Report of The American Law Institute.

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[10]Christy and McLean, Jr., op. cit., at 7.

Silver Memories

Compiled from the World Almanac and the L.A. Daily Journal of November, 1932, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

The U. S. Supreme Court has ruled that the use of the State Militia by Governor **Ross Sterling** of Texas to enforce his orders restricting prohibition of crude oil was an unconstitutional use of his executive authority.

* * *

Soon after the 72nd Congress convened at the nation's capitol in its final session, Speaker and Vice-President-elect **John N. Garner** introduced in the House of Representatives a resolution to submit to conventions in the several States the question of repealing the 18th (prohibition) amendment to the U. S. Constitution. The resolution failed by a two-thirds majority, the voting being 272 ayes and 144 nays. Of the nays, 81 were "lame ducks" who failed of reelection last month.

* * *

The first detachments of hunger marchers visiting Washington to petition President **Hoover** for help, bivouacked for three days on the old grounds of Camp Meigs, a wartime cantonment. With police sentinels on every side, 2,500 men, women and children huddled in trucks, in shaky automobiles and motorcycle sidecars.

* * *

Radio City Music Hall, the largest of its kind in the world, has opened in Rockefeller Center.

* * *

The $5.00 a day coal mine wage in Illinois has been extended by agreement. At a Chicago rail wage conference, an agreement was signed extending the present 10% pay deduction for another 10 months.

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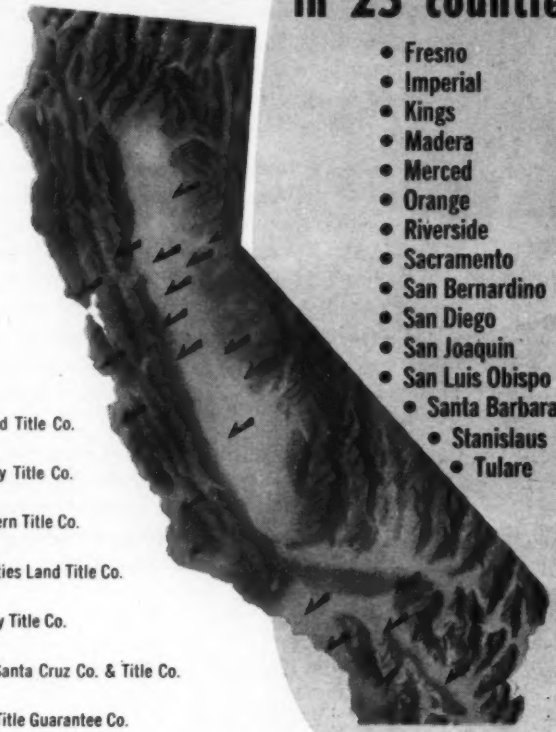

- Fresno
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- Madera
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Five foreign debtors—France, Belgium, Hungary, Poland and Estonia—have defaulted on payments to the U. S. on war, relief and supplies debts amounting to $25,000,000. Six countries—Czechoslovakia, Great Britain, Finland, Italy, Lithuania and Latvia—from which $98,000,000 was due, have paid up in full.

* * *

At Boulder City, Nevada, a hole 50 feet in diameter was blasted through the Grand Canyon wall, and the Colorado River was thus diverted from the canyon to a new (temporary) course for a mile outside and around the proposed site of the Hoover Dam.

* * *

The 14th anniversary of the military end of the World War finds victors and vanquished alike struggling with its economic aftermath. Surveying gains and losses from the "war to end wars" and to "make the world safe for democracy," American observers find little to cheer them. Among credits they count a unified America, its national spirit forged in the fires of France, and the birth of a world movement toward international peace. But the list of debits are longer. It includes redoubled armament burdens (5½ billion on armies and navies), $300 billion diverted from normal productive channels to payment for spent shot and shell, and a resurgence of dictatorships (Italy, Russia and Poland) and fiery nationalism which threaten to destroy all gains for democracy.

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Anticipating a change in the prohibition law, two of the largest wineries in the Lodi district have started working double shifts crushing grapes.

* * *

Huey (King Fish) Long, fiery, red-faced soap peddler who became the United States Senator from Louisiana, has donned snow white linen and a red necktie and has announced that he is planning a nationwide campaign to "rid America of its multimillionaires."

* * *

A recent publication of the American Bar Association reports some incredible facts concerning the increase in the number of lawyers and the threatened inundation of the profession on a national scale. It is estimated that fewer than 5,000 new lawyers need be admitted annually in the country

to maintain the ranks, already overcrowded. But actually there are at present forty thousand students in law schools. The report discloses an 80% failure in a recent California bar examination, of an 81% failure in Massachusetts, of a 74% failure in Utah and Rhode Island. Yet, these drastic eliminations will not suffice to stem the tide, because applicants who persist usually gain admission after a second or fifth or tenth attempt to gain admission. So the Section on Legal Education suggests that it is up to the various Supreme Courts to stem the tide by increasing educational requirements.

Unions Demand Prepaid Legal Fees

The latest "fringe" benefit bargained for by local unions is a prepaid legal care plan financed through employer contributions! This was the demand of the six local unions which make up the Los Angeles Joint Board of Hotel and Restaurant Employees, according to the Wall Street Journal for June 14, 1957.

This demand is patterned after some of the health and welfare plans relating to medical bills, and the scheme would be designed to pay all workers' legal fees in both criminal and civil cases. The plan would not take care of fines and penalties, but the fund would pay not only legal fees but also court costs.

One of the things that is feared in connection with such a program is that it will let loose a spate of nuisance suits, since the restraining influence of court costs and attorneys' fees will be removed from the picture. Also, there is the problem of the extent to which employees should be covered on their economic interests outside of their employment. For instance, an employee might be a partner in an auto repair business wholly unrelated to his regular employment. Moreover, there is the problem of the extent to which the fund should cover an employee involved in a criminal action who might choose to forego the free services of a public defender, knowing that the fund would foot the bill.

The problem of union demands for prepaid legal care is one that the Bar apparently is going to have to face. (For collateral reading see the ABA Unauthorized Practice of Law Committee opinion in 1950, and Informative Opinion No. A of 1950, August, 1950, A.B.A. Journal, vol. 36, No. 8, p. 677.)

SHE BROUGHT CALVARY TO CAHUENGA PASS

On June 27, 1920, writer-producer Christine Wetherill Stevenson saw the Hollywood hills become the hills of Judea. In a natural amphitheater off Cahuenga Pass, her Pilgrimage Play, destined to become world famous, was given its first performance. The audience sat in a modest wooden gallery—a far cry from the massive concrete structure that houses the Pilgrimage Theater today. Henry Herbert, as the Christus, set a note of dignity and reverence that subsequent players in the role—Ian Maclaren and Nelson Leigh among them—have maintained for 27 seasons, helping make the Pilgrimage Play a cherished Southern California institution.